80-1075

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

LEROY JENKINS,
PETITIONER,

versus

STATE OF SOUTH CAROLINA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL R. MCLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEYS FOR RESPONDENT.

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OPINION BELOW

The memorandum opinion of the South Carolina Supreme Court is Opinion Number 80-MO-296 (filed September 25, 1980). Said opinion will not be published.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I. Whether the Petitioner was denied effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 3 and 14 of the Constitution of the State of South Carolina by the refusal of the trial court to grant Petitioner's trial counsel's motion for continuance, said motion being based on trial counsel allegedly having insufficient time to prepare a defense.

II. Whether the Petitioner was denied a fair trial and impartial jury, in violation of the provisions of the due process clause of the Fourteenth Amendment, by the refusal of the trial court to grant Petitioner's trial counsel's motions for additional voir dire and a continuance.

ARGUMENT

The State of South Carolina, in opposition to the Petition for a Writ of Certiorari in this matter, respectfully submits the following:

I.

The trial court was well within its discretion in denying Petitioner's motion for continuance based upon alleged inadequate defense preparation. (Petitioner's Question A)

Petitioner accurately sets forth the time sequence of events beginning with his arrest on April 17, 1979, pursuant to a warrant charging him with three (3) misdemeanor violations: two (2) charges of conspiracy to commit arson and one (1) count of conspiracy to commit assault and battery of a high and aggravated nature. On May 9, 1979, a full 22 days after Petitioner's arrest, a preliminary hearing was held wherein the State established probable cause to bind Petitioner over for trial. Subsequent to that hearing, Petitioner was informed that the grand jury would be asked to return an indictment on a fourth misdemeanor charge: conspiracy to commit assault and battery of a high and aggravated nature.

On May 14, 1979, five (5) days after having received such notice, indictments were returned on all four (4) counts by the grand jury and the case was called for trial by the State. At this time Petitioner's counsel, consisting of no less than four (4) experienced criminal trial attorneys, strenuously moved for continuance based upon alleged insufficient time to prepare for trial, as well as the existence of allegedly prejudicial pretrial publicity which Petitioner claimed would jeopardize his ability to receive a fair trial.

As to the former contention, it is noteworthy that Petitioner had filed and was prepared to argue numerous pretrial motions (i.e., Tr. pp. 55-62). Furthermore, counsel's sole reason propounded for justifying a continuance was the claimed inability to review 300 pages of transcripts of tape recordings of conversations between Petitioner, his codefendants and an undercover agent. These tapes constituted the vast bulk of the State's case, being in and of themselves overwhelming evidence of Petitioner's guilt. In fact, it is also noteworthy that Petitioner does not question the sufficiency of the evidence against him, thereby submittedly casting severe aspersion upon the merits of his claim that the jury verdicts were prejudiced to the extent that a different result might have been reached if a continuance had been granted. At any rate, the trial court did grant continuances amounting to three (3) additional days, the case being called for trial on May 17, 1979. At this time, counsel renewed the motion for continuance based upon the prior claim that, "we have not had the ability and the time necessary to sit and cogitate, and to confer and to analyze, and to let ideas incubate during this period of time so that we can properly prepare a defense for our client" (Tr. p. 108, line 22-p. 109, line 1).

Respondent deems it necessary to emphasize that Petitioner's sole claim prior to trial was that counsel had not had time to study the transcripts of State's evidence to their satisfaction. However, Petitioner has attempted to add other alleged grounds to bolster his present claim of ineffective assistance of counsel which were never alleged at trial, and certainly never demonstrated to the lower court. Respondent

respectfully submits that nothing in the Record supports Petitioner's present claim that he was denied the right to call witnesses in his behalf, other than himself, who would have been beneficial to his case. Of course, if such a claim had been made at trial, Petitioner would have had to comply with Circuit Court Rule 27 regarding motions for continuance on account of the absence of a witness before such a motion could have been granted. Since no such allegation or showing was propounded by Petitioner at trial, his injection of this issue on appeal is submittedly improper. Furthermore, Petitioner's contention that he was denied the services of his "lead trial counsel" on his direct examination, "presumably because lead counsel's preparation time was consumed with reviewing the tapes" is absolutely unsupported by the Record and, in any event, specious. Petitioner's claim that the trial court's denial of a continuance led to ineffective assistance of counsel because of "the inability of defendant's lead counsel, clearly the most experienced trial attorney among defendant's lawyers, to handle the defendant as a witness, because of his necessary devotion to other aspects of the case in an extremely limited time period, resulted in several highly objectionable questions on cross-examination remaining unchallenged", is one which has no basis in the Transcript of Record and hence is unworthy of consideration by this Court.

Of course, it is a well settled principle of law in South Carolina that the granting or refusal of continuance is within the discretion of the trial judge and its disposition of such a motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of Petitioner. Moreover, "when a motion for continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal." *State v. Vaughn,* 268 S.C. 119, 232 S.E.2d 328 (1977). Furthermore, Respondent respectfully submits that *Vaughn* is direct precedent for disposing of Petitioner's claim in the instant case:

> The Appellant advances the argument that a continuance should have been granted because the Solicitor was able to

> call the case for trial when he desired to do so, and, consequently, inadequate notice of the time for trial was provided. This argument is similar to that presented to us in *State v. Mikell,* 257 S.C. 315, 185 S.E.2d 814 (1971), where we rejected the contention. Likewise, we reject it in the instant case. The Appellant has not demonstrated anything that could have been used in his defense that was not employed by counsel. No showing is made of other evidence would could have been produced or additional points raised if a continuance had been granted. See *State v. Squires,* 248 S.C. 239, 149 S.E.2d 601 (1966). No showing of prejudice to the Appellant or abuse of discretion on the part of the trial judge has been made, and, accordingly, we overrule the exception.

The Court has, in fact, refused to disturb the trial court's ruling in cases in which counsel had only one day to prepare for trial. *State v. Duckett,* Memo. Op. No. 755 (October 8, 1975); *State v. Motley,* 251 S.C. 568, 164 S.E.2d 569 (1968); *State v. Strauss,* 114 S.C. 445, 103 S.E. 769 (1920).

As to Petitioner's sole ground properly reserved for review by the Court — that his four (4) able trial counsel were, in fact, unable to adequately study and analyze the tapes and transcripts of conversations in which he participated and had personal knowledge of — Respondent respectfully submits that the State had no duty to produce these tapes and transcripts in advance of trial at all. In fact, Respondent respectfully disagrees with Petitioner's contention that South Carolina law is relatively unclear as to whether a disclosure to the defense of recorded statements of a defendant is required as mandatory discovery. To the contrary, we respectfully submit that the Court made clear in *State v. Mikell supra,* that where the Solicitor, as here, was generous in sharing information which he had prior to trial, including tapes involving recorded conversations of the defendant, the denial of a defense motion for continuance which was based on the ground that recordings were not supplied them was not an abuse of discretion. As it did in *Mikell,* the Court continued to stand by the well settled rule that there is no right to discovery in a

criminal case. *State v. Smart,* ___ S.C. ___, 262 S.E.2d 911 (1980), *State v. Flood,* 257 S.C. 141, 184 S.E.2d 549 (1971). The Solicitor in the instant case, we respectfully submit, observed the true spirit of justice in supplying these tapes and transcripts in advance of trial. Furthermore, with the actual continuances granted by the trial court, four (4) capable trial counsel had a full four (4) days to study a mere 300 pages of record. It is noteworthy that these transcripts were utilized by defense counsel during the entirety of defense cross-examination of Agent Mirkin, and in fact several additional excerpts not offered by the State were utilized (Tr. pp. 518-658). We respectfully submit that counsel indeed demonstrated their familiarity with the transcripts. Petitioner has demonstrated absolutely no prejudice from his counsels' claimed lack of adequate time to study and "cogitate" upon them.

Regarding Petitioner's claim that these tapes had been tampered with, and that he had insufficient time to determine if such tampering had occurred, Respondent contends Agent Mirkin's testimony was consistent throughout that these tapes were precise recordings of conversations between he and the codefendants in the instant case. Respondent respectfully submits that these tapes were demonstrated to have been made by a device capable of recording interrogation, that the person operating the device was competent, and that they were preserved without alteration. Furthermore, they were identified by Agent Mirkin as having been made during the period of the conspiracy. Hence, we respectfully submit that they were properly introduced into evidence, and that Petitioner should be precluded from any speculation that he could have shown them to have been altered with more time prior to trial. *United States v. Bobo,* (4th Cir.) 477 F.2d 974 (1973); *Stanley v. State,* 240 Ga. 341, 241 S.E.2d 173 (1977).

Respondent respectfully submits that the instant case demonstrates substantial observance of Petitioner's right to a fair trial. Petitioner's contentions alleging otherwise are patently without merit.

II.

The trial court was well within its discretion in denying Petitoner's motion for continuance based upon allegedly prejudicial pretrial publicity. (Petitioner's Question B)

Petitioner claims that the trial court erred in failing to grant an indefinite continuance of his trial, as well as a change of venue *sua sponte,* due to alleged pretrial publicity which threatened his right to a fair and impartial trial by jury. Respondent respectfully submits that Petitioner has again injected allegations and issues into this exception on appeal which were not presented to the trial court, and in fact were undeniably waived. In the first place, during argument on Petitoner's motion for continuance, Petitioner was requesting only a continuance until the next term of court. It was specifically stated that, "we're not asking that this case be continued indefinitely." (Tr. p. 73, lines 11-11.) For Petitioner to now claim that the trial court should have granted an indefinite continuance when such was specifically not the subject of the actual motion made before the lower court is highly improper under any rule of appellate practice.

Respondent respectfully refers to the argument of counsel on Petitioner's motion for continuance wherein it was stated:

> And, Your Honor, putting aside those questions of rapidity with which my client has been thrust in this criminal justice system, there has been a great deal of what I would term adverse publicity surrounding this case. In the newspaper articles we have brought, and we have brought a number of newspaper articles here that we feel are representative of the type of press coverage that has been received, at least, today, we would suggest that in order for this period of furor to sort of quiet down, some continuance is in order. We are not requesting a change of venue. We, of course, suggested that the Solicitor alleges that these crimes were committed in Greenwood County, and Greenwood County is Reverend Jenkins' home, and this is where the case should properly be tried. However, I would submit that because of the inflammatory publicity surrounding this case, because

> of the status of Reverend Jenkins in the community, and that he is certainly a man of high visibility if anything he does is viewed, if Your Honor will, under a magnifying glass, that under these circumstances, this case should properly be continued. (Tr. p. 71, line 16-p. 72, line 10.)

Of course, it is well settled that the burden is on the moving party to show that prospective jurors have been prejudiced by pretrial publicity. As stated in *State v. Fowler,* 266 S.C. 203, 222 S.E.2d 497, 498-499 (1976):

> When an appellant alleges he was denied a fair trial due to pretrial publicity, normally he must show the jurors were aware of the publicity and that the publicity constituted legal prejudice. *State v. Swilling,* 249 S.C. 541, 155 S.E.2d 607 (1967). Moreover, recently we quoted applicable language from *Irvin v. Dowd,* 366 U.S. 717, 81 S. Ct. 1639, 66 L. Ed. 751 (1961) which states that mere exposure to adverse publicity does not automatically disqualify a prospective juror. 'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' p. 1643 quoted in *DeLee v. Knight, Sheriff of Dorchester County,* 266 S.C. 103, 221 S.E.2d 844 1975.
>
> The surrounding circumstances and the impact of pretrial publicity at *the time of trial* is the focus of any inquiry concerning prejudicial publicity. Absent extraordinary circumstances, the ruling of the trial judge, developed through adequate voir dire examination of the jurors, that the objectivity of the jury panel has not been polluted with outside influence, will not be disturbed. *Wansley v. Slayton,* 487 F.2d 90 (4th Cir. 1973). The facts in the instant appeal are measurably different from the massive publicity and community hostility which occasioned reversal of convictions in *Irvin v. Dowd, supra* and *Sheppard v. Maxwell,* 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). Accordingly, this exception is overruled.

In his submittedly insufficient attempt to demonstrate that the trial court erred in denying his motion for continuance,

Petitioner alleges error on the part of the trial court in failing to ask any specific questions concerning pretrial publicity during his voir dire and, also, in the fact that said voir dire was conducted with the collective venire rather than individually. As to the former contention, Respondent respectfully submits that the trial court, in his ruling on Petitioner's motion for defense counsel to individually voir dire prospective jurors, ruled that it would consider any questions requested by Petitioner (Tr. p. 104-A, lines 9-23). However, a review of those questions asked after counsel had been invited to submit any questions indicates that no such questions were requested by Petitioner. Of course, it has been settled for many years that the trial court is not required to conduct any voire dire, including that mandated by statute, absent a request for such examination. *State v. Cooper,* 212 S.C. 61, 46 S.E.2d 545 (1948). As to any other questions not mandated by statute, it is also not error if the court on its own initiative fails to make such examination. *State v. Gidron,* 211 S.C. 360, 45 S.E.2d 587 (1947). Hence, the trial court satisfied his responsibility by propounding the question as to whether any juror was conscious of any bias or prejudice, or whether any juror had formed any judgment in advance of hearing the evidence in this case (Tr. p. 153, lines 18-21). Failure of counsel to request any further, and more specific questions concerning pretrial publicity involving Petitioner constitutes a waiver of any exception to such omission upon appeal.

Concerning Petitioner's present objection on this appeal that the trial court erred in refusing to conduct individual voir dire in the instant case, Respondent respectfully submits that this issue must be viewed in two particulars. There is no question that the trial court was requested, and refused to allow defense counsel to conduct individual voir dire. Respondent respectfully submits that this was entirely within his discretion and, in fact, it has been held by the State Supreme Court that the better practice is for the judge to conduct such examination. *State v. Britt,* 237 S.C. 293, 117 S.E.2d 379 (1976). Hence, we respectfully submit that the trial court's discretion in this regard should remain inviolate.

Presuming that Petitioner also contends on this appeal that the trial court erred in refusing to conduct individual voir dire itself, Respondent would first contend, again, that no request for or an objection to the failure of the trial court to conduct individual voir dire itself was ever made. (Tr. p. 104-A, lines 9-23; p. 152, line 13-p. 154, line 9.) Furthermore, none of Petitoner's exceptions specifically allege error in the trial court's refusal to conduct individual voir dire itself. Respondent contends that this is in patent disregard of Supreme Court Rule 4, Section 6 and constitutes a further waiver of this issue on appeal.

However, assuming this Court wishes to address the merits of the trial court's failure to conduct individual voir dire in the instant case, it appears that such issue, if properly objected to at trial and made the proper subject of a separate, concise and specific exception on appeal, has not been settled in South Carolina. The closest the Court has come to addressing the issue was in *Gidron, supra,* wherein it was stated:

> It appears that in some jurisdictions prospective jurors are examined as to their qualifications separately and in other jurisdictions collectively. This may be due to a difference in the applicable statutory requirements of the various states. In some jurisdictions it is error to refuse to allow individual examination. 31 Am. Jur. Jury, Section 105, p. 635; 50 C.J.S. Juries, Section 276 c. In this State, under the terms of [Section 14-7-1020 of the 1976 Code], it is the duty of the court, on motion of either party, to examine under oath the prospective jurors with respect to their competency. It is not error if the court on its own initiative fails to make such examination.
>
> It is unnecessary to now determine whether it would constitute reversible error to refuse a request for a separate examination of each juror on his voir dire. Certainly in capital cases it is the better practice to examine the jurors in this manner even though a separate examination is not requested. But in the instant case no request for a voir dire examination was made until after several jurors had already been drawn and accepted. The prospective jurors

thereafter drawn were separately examined. After the panel was completed, those who had not been previously examined under oath were sworn and the usual questions respecting their qualifications were propounded to them as a body.

The court inquired if this procedure was satisfactory and there was no response. Under these circumstances it is apparent that any right to a separate examination was waived.

Respondent contends that such waiver of any right to separate voir dire, if indeed one exists in this State, likewise occurred here. However, Respondent respectfully submits that this State is one wherein the rule has become well settled that the manner and extent of voir dire examination is within the discretion of the trial court; and that this discretion will not be reviewed absent a showing of abuse. Respondent respectfully submits no such showing has been made.

We respectfully contend that the trial court was well within its discretion in denying Petitioner's motion for continuance and, insofar as Petitioner's arguments regarding voir dire examination reflect upon that decision, we further contend that the trial court satisfied itself that the jury venire was unbiased and unprejudiced against Petitioner. Petitioner's exception alleging otherwise is without merit.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL R. MCLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT.